JUDGING JUDGES: WHY STRICT SCRUTINY RESOLVES THE CIRCUIT SPLIT OVER JUDICIAL SPEECH RESTRICTIONS

*Ashna Zaheer**

INTRODUCTION

On June 27, 2002 the Supreme Court, in *Republican Party of Minnesota v. White*[1], struck down as unconstitutional a provision of Minnesota's judicial code that prohibited judicial candidates from announcing their views on disputed legal and political issues.[2] In a five-four opinion, the majority reviewed the speech restriction under strict scrutiny and held that the regulation was not narrowly tailored to meet a compelling state interest, therefore violating judicial candidates' First Amendment rights.[3]

Judicial election has been a longstanding feature of the majority of states' judicial selection.[4] Currently, forty states have some form of judicial election system.[5] Further, regulation of judicial candidates' speech during elections is not uncommon. Traditionally, the judiciary has been regarded as the "guarantor of individual rights,"[6] "dedicated to 'inflexible and uniform adherence' to the 'fundamental law' of the Constitution."[7] Inherent in the role of the judiciary is the

* Candidate for Juris Doctor, Notre Dame Law School, 2012; B.A., Vanderbilt University, 2009. I would like to thank my family for their love and support.

1 536 U.S. 765 (2002).

2 *See id.* at 788.

3 *See id.* at 776–77.

4 *See* Kathleen M. Sullivan, Republican Party of Minnesota v. White*: What are the Alternatives?*, 21 GEO. J. LEGAL ETHICS 1327, 1327 (2008)

5 *See* AM. JUDICATURE SOC'Y, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Oct. 10, 2011).

6 Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the* Model Code of Judicial Conduct's *Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441, 446 (2006) (citing THE FEDERALIST NO. 78 (Alexander Hamilton).

7 *Id.* at 446 (footnote omitted) (quoting THE FEDERALIST, NO. 78 (Alexander Hamilton)).

notion that judges must act impartially in applying the law, "putting aside any preconceived notions, political agendas, social commitments, and personal biases."[8] However, the election process, and the accompanying politicization, has posed threats to this idea. Accordingly, the majority of states that elect their judges have adopted codes of judicial conduct, which effectively regulate and restrict judicial campaign speech in order to maintain the "independence, integrity [and] impartiality" of its judiciary.[9]

The decision in *White* was especially notable because it was the first time the Supreme Court considered the constitutionality of states' restrictions on judicial campaign speech. Many of these provisions regulating judicial speech had gone unchallenged for quite some time, and were generally abided by until recent times.[10] In invalidating Minnesota's "announce" clause, *White* made clear that states would not be permitted to stifle judicial candidate speech at the expense of First Amendment protections.[11] Indeed, the Court subjected Minnesota's speech restriction to strict scrutiny, the most intensive type of judicial review.[12] However, the decision also left many issues unanswered. Justice Kennedy, in his concurring opinion, emphasized the fact that the holding applied to judicial candidates rather than incumbent judges.[13] Thus, he noted that the opinion left open the possibility that public employee speech principles, which allow for greater government regulation and less judicial scrutiny, could be extended to sitting judges seeking reelection.[14]

---

8 *Id.* at 447.

9 AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT CANON 49 (2007). The American Bar Association (ABA) has developed the *Model Code of Judicial Conduct*, which prescribes rules prohibiting certain types of speech during judicial elections. The majority of States that elect their judges have either adopted, or borrowed language, from the ABA's Model Code. *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 880 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002) ("Today, most states with an elected judiciary have campaign speech restrictions patterned after either the 1972 or 1990 ABA model canons."); Julie Schuering Schuetz, *Judicial Campaign Speech Restrictions in Light of* Republican Party of Minnesota v. White, 24 N. ILL. U. L. REV. 295, 306 (2004).

10 *See* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 35 IND. L. REV. 701, 701 (2002).

11 *See generally White*, 536 U.S. 765 (2002) (holding unconstitutional a provision of Minnesota's judicial code that prohibited judicial candidate from announcing their views on disputed legal and political issues).

12 *Id.* at 774.

13 *Id.* at 796 (Kennedy, J., concurring).

14 *Id.* (Kennedy, J., concurring) ("Whether the rationale of *Pickering v. Board of Educ.*, and *Connick v. Myers*, could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote

After *White*, lower courts began considering the legality of other provisions restricting judicial campaign speech.[15] However, the courts have split on the appropriate level of scrutiny with which to review judicial speech restrictions. Like the Supreme Court in *White*, the Sixth and Eighth Circuits have rightly afforded judicial candidates' speech the utmost protection under the First Amendment, and have reviewed these restrictions under strict scrutiny.[16] On the other hand, the Seventh Circuit, acknowledging Justice Kennedy's concurrence, has applied a lesser "balancing test" to uphold the validity of various provisions, based on the faulty premise that judicial candidates are public employees.[17]

This Note explores the constitutionality of restraints on judicial election speech, specifically focusing on the appropriate level of scrutiny that courts should afford when reviewing the validity of such restraints. Part I provides an overview of the Court's First Amendment jurisprudence with respect to both strict scrutiny and the balancing test standard. Part II examines the *White* decision in its entirety. Part

---

the efficient administration of justice, is not an issue raised here.") (citations omitted).

15 *See, e.g.*, Wersal v. Sexton, 613 F.3d 821, 827 (8th Cir. 2010) (alleging that Minnesota's "endorsement," "personal solicitation" and "solicitation for a political organization or candidate" clauses of the Minnesota Judicial Code were a violation of the First Amendment); Bauer v. Shepard, 620 F.3d 704, 707 (7th Cir. 2010) (challenging the constitutionality of various provisions of the Indiana Code of Judicial Conduct, which applied to judicial campaign speech, as unconstitutional); Siefert v. Alexander, 608 F.3d 974, 978–79 (7th Cir. 2010) (challenging the constitutionality of Wisconsin's "party affiliation," "endorsement" and "solicitation" clauses); Carey v. Wolnitzek, 614 F.3d. 189, 194–95 (6th Cir. 2010) (challenging the constitutionality of Canon 5 of Kentucky's Code of Judicial Conduct, which prohibits judges and judicial candidates from (1) "identify[ing] [themselves] as a member of a political party in any form of advertising, or when speaking to a gathering," (2) soliciting campaign funds, and (3) "mak[ing] a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way in a case, controversy, or issue likely to come before the judge or court"); Weaver v. Bonner, 309 F.3d 1312, 1315 (11th Cir. 2002) (challenging the constitutionality of Canon 7 of the Georgia Code of Judicial Conduct which (1) prohibited judges and judicial candidates from making negligent false statements and misleading or deceptive true statements and (2) prohibited the judge or judicial candidate from personally soliciting campaign funds).

16 *See Wersal*, 613 F.3d at 829 (reviewing state judicial canon under strict scrutiny); *Carey*, 614 F.3d at 198 (using strict scrutiny to review the constitutionality of Kentucky's judicial election canons).

17 *Siefert*, 608 F.3d at 987 (applying a balancing approach, rather than strict scrutiny to determine the constitutionality of Wisconsin's judicial speech restrictions on endorsing partisan candidates and personally soliciting contributions); *Bauer*, 620 F.3d at 713 (reviewing the constitutionality of Indiana's Code of Judicial Conduct under the balancing approach rather than strict scrutiny).

III summarizes lower courts' application of *White*, and the circuit split that has emerged regarding the appropriate standard of review for judicial speech restraints. Part IV argues that restrictions on judicial candidates' speech, like restrictions on all other political speech must be reviewed under strict scrutiny. It will show that based on First Amendment speech principles, as well as practical considerations, the lesser balancing test is inapplicable to judicial campaign speech.

I. FIRST AMENDMENT STANDARDS OF SCRUTINY

Before turning to *White* and the circuit cases, and analyzing the appropriate standard of review for restraints on judicial election speech, it is necessary to briefly discuss the Supreme Court's First Amendment jurisprudence with respect to these different standards of review.

A. Strict Scrutiny

Strict scrutiny is the most intensive type of judicial review.[18] Restrictions on speech reviewed under this standard are generally presumed invalid, and the government has the heavy burden of proving the constitutionality of the restriction.[19] The Supreme Court has drawn a distinction between content-based speech regulations, which are at the heart of First Amendment protection and subject to strict scrutiny, and content-neutral restrictions, which are reviewed under a less rigorous standard.[20] The general rule is that a restriction is deemed "content-neutral" only if it is both viewpoint neutral[21] and subject matter neutral.[22] Otherwise, the restriction will likely fall under the exacting standard of strict scrutiny, only subject to certain categorical exceptions, including incitement,[23] defamation,[24] obscenity,[25] and child pornography.[26] Further, the Court has declared that political

18 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 541 (3d ed. 2006).

19 *See id.* at 542.

20 *See id.* at 933.

21 The restriction is "viewpoint neutral" if it does not target speech based on the "ideology of the message." *Id.* at 934 (citing Amy Sabrin, *Thinking About Content: Can it Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209, 1220 (1993)).

22 The restriction is "subject matter neutral" if it does not target speech based on its topic. *Id.*

23 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

24 *See* Beauharnais v. Illinois, 343 U.S. 250, 254–56 (1952).

25 *See* Roth v. United States, 354 U.S. 476, 481 (1957).

26 *See* New York v. Ferber, 458 U.S. 747, 764 (1982).

speech is at the core of the First Amendment, noting: "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[27] Accordingly, restrictions on political speech have repeatedly been subjected to strict scrutiny.[28]

Although rare, a regulation can survive strict scrutiny if the restriction is narrowly tailored to serve a compelling state interest.[29] To be narrowly tailored, a regulation must: (1) *actually* advance the state's compelling interest, (2) not be overinclusive, in the sense that it restricts speech that does not implicate the compelling interest, (3) be the least restrictive alternative, and (4) not be underinclusive, in the sense that it fails to restrict a significant amount of speech that implicates the compelling governmental interest.[30]

B. Balancing Test

Although the general rule is that content-based speech restrictions are subject to strict scrutiny, the Court has held that certain types of speech are entitled to less protection under the First Amendment, including that of public employees.[31] Under this lower standard of

---

27 Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

28 *See* CHEMERINSKY, *supra* note 18, at 1070.

29 *See, e.g*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990) (upholding the Michigan Campaign Finance Act, which prohibited corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices); *Eu*, 489 U.S. at 229 (holding that California's Election's Code provision, which prohibits the official governing bodies of political parties from endorsing candidates in party primaries, violates the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 813 (1985) (holding that the government did not violate the First Amendment by excluding legal-defense and political-advocacy organizations from participation in the Combined Federal Campaign, a charity drive directed at federal employees); United States v. Grace, 461 U.S. 171, 177, 183–84 (1983) (holding that a law prohibiting demonstrations on sidewalks around the U.S. Supreme Court building was unconstitutional because sidewalks are traditional public forums where people have long expressed their views); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101–02 (1972) (holding a Chicago ordinance which prohibited picketing within 150 feet of a school with an exception for labor picketing unconstitutional under the Equal Protection Clause).

30 Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2421–23 (1996).

31 *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 384, 392 (1987) (holding that an unpopular or extreme comment made on a matter of public interest and spoken by a government employee with no policymaking function and a job with little public

review, the Court balances the employee's right to free speech against the government's interest in restricting the speech. This section examines the seminal cases on public employee speech, including those most pertinent to our discussion.

1. *Pickering v. Board of Education*[32]

In *Pickering v. Board of Education,* Pickering, a public high school teacher, was fired after he sent a letter to a local newspaper criticizing the school board's dispersion of funds, and informing taxpayers of the real reasons why additional tax revenue was being sought.[33] The school board dismissed the teacher on the grounds that his "statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration[,]" and "damaged the professional reputations of its members and of the school administrators."[34]

In determining whether the First Amendment protected Pickering's speech, the Court reviewed the dismissal under a less rigorous standard than that of strict scrutiny.[35] Instead, the court acknowledged that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[36] Accordingly, the Court concluded that the appropriate standard in this case was to balance "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[37]

Even under the less intensive review, the Court held that the facts of the case tipped the balance in favor of the teacher, such that the First Amendment protected his speech. The Court noted that the teacher's statements neither impeded his job performance nor inter-

interaction is protected by the First Amendment); Connick v. Myers, 461 U.S. 138, 140, 154 (1983) (holding that a government employee's questionnaire concerning her superior's management practices is not protected speech under the First Amendment because most of the matters the questionnaire concerned were of personal, not public, concern); Pickering v. Bd. of Educ., 391 U.S. 563, 568, 574 (1968) (holding that a public school teacher has a right under the First Amendment to speak on issues of public concern without being dismissed from his position).

32 391 U.S. 563, 568 (1968).

33 *See id.* at 566.

34 *Id.* at 567.

35 *Id.* at 568.

36 *Id.*

37 *Id.*

fered with the school's operation.[38] Further, the Court emphasized that the statements, which addressed the school's allocation of funds, were a matter of "legitimate public concern."[39] Because teachers are likely to have an informed opinion on how funds should be allocated, the Court held that it was "essential that they be able to speak out freely . . . without fear of retaliatory dismissal."[40] Therefore, the Court concluded that the teacher's interests outweighed the state's, and the school's regulation of his speech violated the First Amendment.[41]

2. *Connick v. Myers*[42]

In *Connick v. Myers*, the Court reinforced and refined the decision of *Pickering*. The dispute in *Connick* arose after the plaintiff, an Assistant District Attorney, was notified, that despite her objections, she was being transferred to a different section of the criminal court.[43] Angered by the decision, the plaintiff circulated a questionnaire soliciting the views of staff members and attorneys concerning the "office transfer policy, office morale, the need for a grievance committee, [and] the level of confidence in supervisors."[44] The plaintiff was immediately fired for insubordination, and she sued claiming a violation of the First Amendment.[45]

Relying on the *Pickering* balancing test, the Court ruled against the plaintiff.[46] Specifically, the Court said that the plaintiff's questionnaire did not comment on matters of public concern, stressing that "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of *public concern*,' was not accidental."[47] Indeed, the Court stated, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[48] Further, the Court added an additional consideration to

38 *See id.* at 572–73.
39 *Id.* at 571.
40 *Id.* at 572.
41 *See id.* at 574–75.
42 461 U.S. 138 (1983).
43 *See id.* at 140.
44 *Id.* at 141.
45 *See id.*
46 *See id.* at 142.
47 *Id.* at 143 (emphasis added) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
48 *Id.* at 146.

their *Pickering* analysis, noting that the question of whether speech addresses "a matter of public concern" should be "determined by the [statement's] content, form, and context."[49]

3. *U.S. Civil Service Commission v. National Association of Letter Carriers*[50]

In *Letter Carriers*, the Court considered the constitutionality of the federal Hatch Act, which prohibited government employees from taking "an active part in political management and in political campaigns."[51] In upholding the Act, the Court turned to the *Pickering* balancing test as the appropriate standard for review, and concluded that the interests served by the limitations contained in the Hatch Act weighed in the government's favor.[52] Specifically, the Court identified that the government had a compelling interest in the impartial execution of laws, noting that "partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly."[53] The Court also noted that preventing the appearance of government employee partisanship furthered the government's interest in maintaining confidence in the "system of representative Government."[54]

II. REPUBLICAN PARTY OF MINNESOTA V. WHITE

A. Background

Since its inception, the Minnesota State Constitution has provided that all state judges are to be selected by popular election.[55] In 1974, the Minnesota Supreme Court developed a code of judicial conduct based largely on the 1972 ABA Model Code of Judicial Conduct.[56] The judicial code has been revised over time and includes rules "relating to a candidate's ability to attend and speak at political gatherings, to solicit campaign funds, and to discuss certain topics."[57] The Canons of the Minnesota Code implicated in this case applied both to

49 *Id.* at 147–48.

50 413 U.S. 548 (1973).

51 5 U.S.C. §§ 7324–7325 (2006). This law was substantially modified in 1993; see 5 U.S.C. § 7324 (1994).

52 *Letter Carriers,* 413 U.S. at 565.

53 *Id.* at 564.

54 *Id.* at 565.

55 *See* Republican Party of Minn. v. Kelly, 247 F.3d 854, 857 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

56 *Id.*

57 *Id.*

judicial candidates and incumbent judges. "Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay."[58] Attorneys who violate the code "are subject to, *inter alia*, disbarment, suspension, and probation."[59]

In 1996, Gregory Wersal was a candidate for associate justice of the Minnesota Supreme Court.[60] During the course of his campaign, Wersal, along with members of his campaign committee, engaged in a number of activities on Wersal's behalf including: (1) attending, speaking, and distributing campaign literature at Republican party gatherings; (2) announcing that Wersal was in favor of a strict construction of the Constitution and was critical of certain Minnesota Supreme Court decisions; (3) identifying Wersal as a member of the Republican party; (4) seeking the Republican party's endorsement; and (5) soliciting campaign contributions.[61] As a result of this conduct, a complaint with the Office of Professional Responsibility was filed against Wersal, claiming that he had violated Canon 5 of the Minnesota Judicial Code.[62] The complaint was dismissed for various reasons, including ambiguities in the Code.[63] Nonetheless, Wersal withdrew his candidacy, fearing that further complaints might jeopardize his legal career.[64]

In 1998, Wersal once again ran for the same judicial office, and sought an advisory opinion from the Office of Professional Responsibility regarding its intentions in enforcing "the prohibitions against judicial candidates [contained in Canon 5]: (1) speaking on their own behalf to political party organization gatherings; (2) seeking, accepting or using endorsements from a political party organization; and (3) announcing his or her views on disputed legal issues."[65] The Office responded that it would enforce the first two prohibitions, but refused to answer whether it would enforce the third, stating that more specificity was needed on the types of statements he would be

58 *White*, 536 U.S. at 768 (citing Minn. Rules of Board on Judicial Standards 4(a)(6), 11(d) (2002)).

59 *Id.* (citing Minn. Rules on Lawyers Professional Responsibility 8–14, 15(a) (2002)).

60 *Id.* at 768.

61 Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 972 (D. Minn. 1999), *aff'd*, 247 F.3d 854 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

62 *See Kelly*, 63 F. Supp. 2d at 972.

63 *See id.* at 972–73.

64 *See id.* at 973.

65 *Id.* at 973–74.

making, and expressing doubt of the constitutionality of the third prohibition.[66]

In response, Wersal, the Republican Party of Minnesota, and various other individuals and organizations filed suit in the District Court of Minnesota, challenging the constitutionality of various provisions of Canon 5.[67] In Count I, the plaintiffs alleged that prohibiting judicial candidates and others, acting on their behalf, "from attending and speaking at political gatherings" infringed on their First Amendment right to freedom of speech and association, as well as the equal protection clause of the Constitution.[68] Count II claimed that the "announce clause," which banned judicial candidates from announcing their views on disputed legal or political issues was a violation of their right to freedom of speech.[69] Count III asserted that prohibiting judicial candidates from identifying their political party constituted an infringement on their rights of freedom of speech, association and equal protection.[70] Count IV alleged that banning judicial candidates from "seeking, accepting or using political party endorsements," also violated their rights of freedom of speech, association, and equal protection.[71] Finally, Count V claimed that restricting judicial candidates from personally soliciting campaign contributions violated their right to free speech.[72]

B. District Court Opinion

The district court separately considered the constitutionality of the political activity clause, personal solicitation clause, and announce clause of Canon 5 (Counts I, II, and V respectively), under a strict scrutiny analysis.[73] The court held that each of these prohibitions served a compelling state interest of "maintaining the actual and apparent independence of the judiciary."[74] Further, the court noted that the "restrictions on judicial candidates' political activity and fund solicitation were narrowly tailored to serve those interests."[75] With

66 *See id.* at 974.
67 *See id.*
68 *Id.*
69 S*ee id.*
70 S*ee id.*
71 *See id.*
72 *See id.*
73 *See generally id.* at 974–86 (evaluating Counts I, II and V using a strict scrutiny standard).
74 *Id.* at 977.
75 Republican Party of Minn. v. Kelly, 247 F.3d 854, 860 (8th Cir. 2001), *rev'd sub nom.* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

respect to the announce clause, the court acknowledged that there may be some constitutional difficulties with the clause as written because, although it serves a compelling interest, it may not be narrowly tailored.[76] Specifically, the court noted that another court had concluded that language identical to the announce clause violated the First Amendment, "because the canon reached far beyond speech that could reasonably be interpreted as committing a candidate in a way which would compromise impartiality if such candidate succeeded in the election."[77] Nevertheless, the court decided that the clause could be narrowly construed, so as to not violate the First Amendment, by interpreting it "as only prohibiting discussion of a judicial candidate's predisposition to issues likely to come before the court."[78]

C. Eighth Circuit Opinion

The Eighth Circuit affirmed the ruling of the district court.[79] Further, the court explicitly rejected the defendant's suggestion that the court look to *Letter Carriers* and other cases following it which reviewed restrictions on government employees' speech under a balancing test rather than strict scrutiny.[80] Although the court acknowledged that the balancing test could be applied to Wersal despite the fact that he was not a government employee—"[t]he state c[ould] reasonably conclude that Wersal's actions as a candidate could affect his actions as a judge if he [wa]s elected"[81]—the court held that the type of restrictions present in this case were different than the Hatch Act provisions challenged in *Letter Carriers*.[82] Specifically, the court reasoned that

> the Hatch Act restrained political activity of government employees, [whereas] Canon 5 restrains the activity of candidates engaged in an election contest . . . [and] the public's interest in free speech is greater where the person subject to restrictions is a candidate for public office, about whom the public is obliged to inform itself.[83]

Accordingly, the court held that the appropriate standard of review was strict scrutiny.[84]

---

76 *See Kelly*, 63 F. Supp. 2d at 984–85.

77 *Id.* at 984 (citing Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993)).

78 *Id.* at 986.

79 *See Kelly*, 247 F.3d at 857.

80 *See id.* at 864 (citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973)).

81 *Id.* at 864 (citing Buckley v. Valeo, 424 U.S. 1, 26–27 (1976)).

82 *See id.* at 864.

83 *Id.*

84 *See id.*

The Eighth Circuit found that the provisions of Canon 5 served two "undeniably compelling"[85] state interests: "[P]reserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[86] Like the district court, the Eighth Circuit held that the political activities, personal solicitation, and announce clauses of Canon 5 were narrowly tailored to meet these state interests, thus surviving strict scrutiny.[87] The court also emphasized that although the state has chosen to select its judges by popular election, this decision could not be regarded "as an abandonment of a State's interest in an independent judiciary,"[88] and that "[j]udges remain different from legislators and executive officials . . . in ways that bear on the strength of the state's interest in restricting their freedom of speech."[89]

D. Supreme Court Opinion

On appeal, the Supreme Court only considered the constitutionality of the announce clause.[90] In a five-four split, the Court reversed the Eighth Circuit, declaring Minnesota's announce clause to be a violation of the First Amendment.[91]

The majority opinion, authored by Justice Scalia, began by defining the scope of the announce clause, concluding that it would prohibit a judicial candidate from stating his view "on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*."[92] The Court then proceeded to review the clause under strict scrutiny, noting that the Eighth Circuit had also determined that this was the proper test, and that neither party disputed it.[93]

In determining whether preserving the actual and apparent impartiality of the judiciary were indeed compelling state interests to justify the announce clause, Justice Scalia stated it was necessary to

85 *Id.* ("There is simply no question but that a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order.").

86 Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002).

87 *See Kelly,* 247 F.3d at 872–85.

88 *Id.* at 867 (citing Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993)).

89 *Id.* at 862 (quoting *Buckley*, 997 F.2d at 228).

90 *See White,* 536 U.S. at 770.

91 *See id.* at 788.

92 *Id.* at 773.

93 *See id.* at 774.

define the term "impartiality."[94] He offered three meanings of the term.[95] First, he provided the "root meaning" of the term, and stated that impartiality means "the lack of bias for or against either *party* to the proceeding."[96] In this sense, impartiality "assures equal application of the law . . . [and] guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."[97] The Court implied that under this definition the announce clause served a compelling state interest, but failed strict scrutiny nonetheless because it was "barely tailored to serve th[e] interest *at all*," as it did not "restrict speech for or against particular *parties*, but rather speech for or against particular *issues*."[98]

Second, Justice Scalia stated that "impartiality" could be defined "to mean lack of preconception in favor of or against a particular *legal view*."[99] However, the Court noted that impartiality in this sense would not serve a compelling state interest,[100] because judges possessing a "complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[101] Third, Justice Scalia offered that "impartiality" may be defined as open-mindedness.[102] Under this definition, a judge may have preconceptions on legal issues, but would be "willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case."[103] The Court left open whether this definition of impartiality served compelling state interests, noting that it did not "believe the Minnesota Supreme Court adopted the announce clause for that purpose."[104] Therefore, since the announce clause was not narrowly tailored to meet a compelling state interest under any definition of "impartiality," the Court held that the clause failed strict scrutiny, and was an unconstitutional infringement of free speech.

Finally, the majority concluded its opinion by discussing the "obvious tension between the article of Minnesota's popularly approved constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most

94 *See id.* at 775.
95 *See id.* at 775–79.
96 *Id.* at 775.
97 *Id.* 775–76.
98 *Id.* at 776.
99 *Id.* at 777.
100 *See id.*
101 *Id.* at 778.
102 *See id.*
103 *Id.*
104 *Id.*

subjects of interest to the voters off limits."[105] Specifically, the Court emphasized "'[d]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the *First Amendment* freedoms,' not the edges,"[106] and that the government has never been permitted to restrict "candidates from communicating relevant information to voters during an election."[107] Thus, the Court asserted that if a state chooses to "tap the energy and the legitimizing power of the democratic process," by selecting judges through election, "it must accord the participants in that process . . . the *First Amendment* rights that attach to their roles."[108]

Justices O'Connor and Kennedy both joined in the majority opinion, but each wrote separate concurrences. Justice O'Connor expressed her aversion to judicial elections, stating that the "very practice of electing judges" undermines any governmental interest in preserving an impartial judiciary, because judges subject to reelection are likely to "feel that they have at least some personal stake in the outcome of every publicized case."[109] Nonetheless, Justice O'Connor was clear to assert that Minnesota had voluntarily assumed these risks, and "[i]f the State has a problem with judicial impartiality, it is largely one the State brought upon itself."[110]

While agreeing with the Court that the announce clause was unconstitutional, Justice Kennedy went even further, stating "content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."[111] Furthermore, he emphasized that political speech is afforded the utmost protection under the First Amendment, "and direct restrictions on the content of candidate speech are simply beyond the power of government to impose."[112] More importantly, however, Justice Kennedy made clear that his opinion was premised on the fact that the announce clause restricted speech of a judicial candidate seeking office,[113] rather than an incum-

105 *Id.* at 787.

106 *Id.* at 781 (emphasis added) (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 222–23 (1989).

107 *Id.* at 782.

108 *Id.* at 788 (emphasis added) (alteration in original) (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

109 *Id.* at 788–89 (O'Connor, J., concurring).

110 *Id.* at 792.

111 *Id.* at 793 (Kennedy, J., concurring).

112 *Id.* at 793–94 ("Minnesota may not . . . censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer.").

113 *See id.* at 796.

bent judge seeking reelection while already sitting on the bench. He explicitly noted that the opinion left open what limitations and speech restrictions may be placed on judges, as employees of the government:

> This case does not present the question whether a State may restrict the speech of judges because they are judges—for example, as part of a code of judicial conduct; the law at issue here regulates judges only when and because they are candidates. Whether the rationale of *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* and *Connick v. Myers* could be extended to allow a general speech restriction on sitting judges—regardless of whether they are campaigning—in order to promote the efficient administration of justice, is not an issue raised here.[114]

Justices Stevens and Ginsburg authored two separate dissenting opinions joined by Justices Breyer and Souter. Justice Stevens claimed that the majority had inaccurately appraised the importance of judicial independence and impartiality, and had proceeded on a flawed assumption that "judicial candidates should have the same freedom 'to express themselves on matters of current public importance' as do all other elected officials."[115] Instead, Justice Stevens asserted that "[e]lected judges . . . occupy an office of trust that is fundamentally different from that occupied by policymaking officials,"[116] and that it is "the business of judges," unlike other elected officials, "to be indifferent to unpopularity."[117]

Likewise, Justice Ginsburg also emphasized the fundamental difference between the role of the judiciary and that of the executive and legislative branches.[118] Further, she expressed her belief that the constitutionality of the announce clause was "amply supported" under two main grounds.[119] First, Justice Ginsburg explained that litigants have a right to an impartial tribunal, under the Due Process Clause of the Fourteenth Amendment, and that "a litigant is deprived of due process where the judge who hears his case has a 'direct, personal, substantial, and pecuniary' interest in ruling against him."[120]

---

114 *Id.* at 796 (citations omitted).

115 *Id.* at 797 (Stevens, J., dissenting) (quoting *id.* at 781–82 (majority opinion)).

116 *Id.*

117 *Id.* at 798.

118 *See id.* at 803 (Ginsburg, J., dissenting) ("Legislative and executive officials act on behalf of the voters who placed them in office; 'judge[s] represen[t] the Law.'") (alterations in original) (quoting Chisom v. Roemer, 501 U.S. 380, 411 (1991) (Scalia, J. dissenting)).

119 *Id.* at 819.

120 *Id.* at 815 (quoting Aetna Life Ins. v. Lavoie, 475 U.S. 813, 824 (1986)).

Accordingly, Justice Ginsburg noted that the announce clause serves to eliminate any interest a judge may have in a given case, thus protecting the due process rights of litigants.[121] Second, Justice Ginsburg stated that the clause reinforces the authority of the judiciary, thereby promoting public confidence in state judges.[122]

III. LOWER COURT EXTENSIONS OF *WHITE*

While the Court in *White* addressed for the first time the constitutionality of restrictions on judicial campaign speech, there were still many issues uncharted by the opinion.[123] First, *White* only considered the constitutionality of the "announce clause." Other common provisions of states' judicial canons, including prohibitions on endorsing public officials, personally soliciting campaign funds, or making "pledges or promises" of conduct while in office, were not addressed by the Court,[124] and still remain intact in many states. Additionally, the decision in *White* pertained to an attorney that was a *candidate* for judicial office. The court did not consider the constitutionality of the clause as it would apply to an incumbent judge seeking re-election.[125] In fact, Justice Kennedy's concurrence, which was essential to the 5-4 majority, explicitly left open the possibility that greater restrictions on incumbent judges' speech may be permissible on the premise that judges are public employees.[126]

Lower courts have attempted to fill in the gaps left by *White*. Some courts have read *White* as validating the notion that judicial elec-

121 *See id.* at 819.

122 *See id.*

123 *See generally* Sullivan, *supra* note 4, at 1330–32 (noting that the *White* Court left intact state roles barring judicial candidates from making promises during judicial campaigns; it did not address incumbent judges running for reelection, and it did not address speech restrictions on campaign supporters).

124 *See generally* Republican Party of Minn. v. White, 536 U.S. 765 (2001) (addressing only the speech for candidates during campaigns). *See also id.* at 770 ("Minnesota Code [also] contains a so-called "pledges or promises" clause, which separately prohibits judicial candidates from making 'pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,'—a prohibition that is not challenged here and on which we express no view.") (emphasis omitted) (citation omitted).

125 *See id.* at 796 (Kennedy, J., concurring) ("This case does not present the question whether a State may restrict the speech of judges because they are judges . . . .").

126 *See id.* ("Petitioner Gregory Wersal was not a sitting judge but a challenger; he had not voluntarily entered into an employment relationship with the State or surrendered any First Amendment rights.); *see also id.* ("Whether the rationale of *Pickering* . . . and *Connick v. Myers* . . . could be extended to allow a general speech restriction on sitting judges . . . is not an issue raised here.").

tion speech is the type of speech that is at the core of First Amendment protection and have held unconstitutional similar bans regulating the conduct of judicial candidates under a strict scrutiny analysis. Other courts have taken a more restrictive approach, allowing for prohibitions on certain types of judicial speech when it deems that the compelling state interest of maintaining an impartial judiciary outweighs the judicial candidates right to free speech under a balancing test analysis. This section will examine lower courts' expansion of *White*, and the circuit split that has emerged regarding two specific and widely adopted judicial canons: the party endorsement clause[127] and the personal solicitation clause.[128]

A. Strict Scrutiny: Eighth Circuit & Sixth Circuit Opinions

1. *Wersal v. Sexton*[129]

In *Wersal v. Sexton*, the Eighth Circuit addressed the constitutionality of Minnesota's endorsement and personal solicitation clauses.[130] The case involved Gregory Wersal, the same petitioner who challenged Minnesota's "announce clause" in *White*. After successfully challenging that clause, Wersal, among others, challenged the "partisan activi-

127 While states have adopted different language to reflect the party endorsement clause, the clause in each state more or less prohibits judges and judicial candidates from publicly endorsing or speaking on behalf of another candidate for public office. *See, e.g.*, 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT, Canon 4.1(A)(3) (2009); WIS. SUP. CT. R. 60.06(2)(b)(4) (1979).

128 Like the party endorsement clause, the specific language of the personal solicitation clause differs among states. Nonetheless, the clause generally stands for prohibiting judges and judicial candidates from personally soliciting campaign contributions. *See, e.g.*, RULES OF THE SUPREME COURT OF KENTUCKY 4.300, Canon 5B(2); ALA. CANONS OF JUD. ETHICS, Canon 7B(4)(A); ILL. CODE OF JUD. CONDUCT, Canon 7B(2); PA. CODE OF JUD. CONDUCT, Canon 7(B)(2); W. VA. CODE OF JUD. CONDUCT, Canon 5C(2); MICH. CODE OF JUD. CONDUCT, Canon 7B(2)(a); OHIO CODE OF JUD. CONDUCT, Rule 4.4(A); ARK. CODE OF JUD. CONDUCT, Canon 4, Rule 4.1(A)(8); IDAHO CODE OF JUD. CONDUCT, Canon 5C(2); MISS. CODE OF JUD. CONDUCT, Canon 5C(2); OR. CODE OF JUD. CONDUCT, JR 4-102(D); WASH. CODE OF JUD. CONDUCT, Canon 7B(2); ALASKA CODE OF JUD. CONDUCT, Canon 5C(3); ARIZ. CODE OF JUD. CONDUCT, Canon 4, Rule 4.1(A)(6); FLA. CODE OF JUD. CONDUCT, Canon 7(C)(1); OKLA. CODE OF JUD. CONDUCT, Canon 5C(2); TENN. CODE OF JUD. CONDUCT, Canon 5C(2)(a); UTAH CODE OF JUD. CONDUCT, Canon 4, Rule 4.2(B)(2); WYO. CODE OF JUD. CONDUCT, Canon 4, Rules 4.2(B)(4)-(5); S.C. CODE OF JUD. CONDUCT, Canon 5(B)(1); N.Y. CODE OF JUD. CONDUCT, Canon 5A(5); R.I. CODE OF JUD. CONDUCT, Canon 5B(1); VT. CODE OF JUD. CONDUCT, Canon 5B(4)(d).

129 613 F.3d 821 (8th Cir. 2010).

130 The court also addressed the constitutionality of Minnesota's clause concerning "solicitation for a personal organization or candidate." *Id.* at 826. However, the validity of this clause is outside the scope of this Note.

ties" and "solicitation" clause of Canon 5 in *White II*.[131] The Eighth Circuit found these clauses to also be a violation of the First Amendment, removing the "partisan activities" clause completely from the Code, and amending the solicitation clause to fall within the confines of the First Amendment.[132] In *Wersal*, the petitioner alleged that the amended solicitation clause in Minnesota's Judicial Code was still unconstitutional, and that the endorsement clause also infringed on his rights afforded by the First Amendment.[133]

The court began its opinion by noting that political speech is at the core of the First Amendment, and that any laws burdening such speech are permitted only if they survive strict scrutiny.[134] Thus, because the endorsement and personal solicitation clauses contained in Minnesota's Judicial Code both "directly limit judicial candidates' political speech," the court concluded that they were constitutionally valid only if they served a compelling state interest, and were narrowly tailored to do so.[135]

With respect to the endorsement clause, the court noted that it served a compelling state interest in promoting impartiality of the judiciary.[136] Further, the court acknowledged that the endorsement clause was more narrowly tailored than the announce clause in *White*, because it "aimed at restricting speech for or against particular *parties*," rather than particular *issues*.[137]

Nonetheless, the court found that the clause was still not tailored enough to meet the exacting standard of strict scrutiny.[138] Although endorsements advocate support for a particular party, and therefore may cause concern for bias, the court noted endorsements can also be used as a proxy for a candidate to express his or her own views on "a myriad of matters."[139] Accordingly, the court found that the clause was overinclusive and regulated more speech than necessary.[140] The court also found the endorsement clause to be underinclusive.[141] Specifically, it found that the clause prevented judicial candidates from endorsing other candidates for public office, but it did not pre-

131 *See* Republican Party of Minn. v. White, White II, 416 F.3d 738 (8th Cir. 2005).
132 *See id.* at 766.
133 *See Wersal*, 613 F.3d at 826.
134 *See id.* at 829.
135 *Id.*
136 *Id.* at 833.
137 *Id.* at 835.
138 *See id.*
139 *Id.*
140 *See id.*
141 *Id.* at 836.

vent them from endorsing parties who had not officially filed for office, or public officials who were already elected, "no matter the likelihood of their becoming litigants in a case before the court."[142] Finally, the court noted that recusal by the judge, rather than a categorical ban on endorsements, "is the least restrictive means of accomplishing [a] state's interest in impartiality."[143]

Like the endorsement clause, the court held the personal solicitation clause was also unconstitutional. Although the court found that preventing candidates from soliciting money from potential litigants addressed a compelling state interest of maintaining "impartiality as to parties to a particular case," the clause was not narrowly tailored to do so.[144] The court reasoned that the real risk for impartiality is not from "the fundraising itself, but rather from a judicial candidate being able to trace contributions back to individual donors."[145] However, the court noted Minnesota had already adopted a less restrictive alternative to address this concern by requiring candidates to refrain from obtaining information "identifying those who contribute or refuse to contribute to the candidate's campaign."[146] Further, the court noted, as it did with the endorsement clause, that recusal will prevent any harm of apparent impartiality and serves to protect both a litigant's due process rights in having an unbiased proceeding and a candidate's right to free speech.[147]

2. *Carey v. Wolnitzek*[148]

In *Carey v. Wolnitzek,* the court used strict scrutiny to invalidate a series of clauses contained in Kentucky's Code of Judicial Conduct, including a provision prohibiting judicial candidates from personally soliciting campaign contributions.[149] In determining the standard for review, the court concluded strict scrutiny was appropriate for primarily two reasons.[150] First, the court noted that the Supreme Court's entire analysis in *White* was premised on the applicability of strict scrutiny, and none of the Justices, including the four dissenters, objected

142 *Id.*
143 *Id.* (quoting Republican Party of Minn. v. White, *White II*, 416 F.3d 738, 755 (8th Cir. 2005)).
144 *Id.* at 839 (quoting *White II*, 416 F.3d at 765).
145 *Id.* at 840 (citing *White II*, 416 F.3d at 765).
146 *Id.* (quoting 52 MINN. STAT. ANN., CODE OF JUDICIAL CONDUCT, Canon 4.2(A)(5)).
147 *Id.* at 841.
148 614 F.3d 189 (6th Cir. 2010).
149 *See id.* at 194–95.
150 *See id.* at 198–99.

to it.[151] Second, the court stated that the clauses at issue here all censored speech based on its content, and that except for the traditional categorical carve-outs, content-based speech restrictions face strict scrutiny.[152] The court explained that reviewing the clauses under the lesser balancing test was inappropriate, because the speech restrictions here were aimed

> not at judges performing court functions but at judges and judicial candidates making campaign statements or solicitations outside of court and outside of the process of deciding cases in their official capacity—all for the purpose of communicating information to voters about whom they should elect.[153]

To further support its position, the court cited a number of cases from other circuits that relied on strict scrutiny to assess the constitutionality of judicial campaign speech restrictions after *White*, including *Weaver v. Bonner*,[154] where the Eleventh Circuit used strict scrutiny to invalidate Georgia's personal solicitation clause.[155]

With respect to the personal solicitation clause in particular, the court stated that it censored content-based speech by "prevent[ing] candidates from asking for support in some ways (campaign funds) but not others (a vote, yard signs)."[156] However, the court found that the solicitation clause met the first prong of strict scrutiny, as it served Kentucky's compelling interest in maintaining the actual and apparent impartiality of its judiciary.[157] Because the general public often is less interested in judicial elections than other elections, the court reasoned that judges must focus their campaign efforts on those "most likely to have an interest in judicial races: the bar."[158] This leads to a situation where "judges preside over cases in which the parties are represented by counsel who have contributed . . . [to their] judicial campaigns."[159]

Despite these considerations, the court held that the personal solicitation clause failed the second prong of strict scrutiny. First, the clause was overinclusive.[160] It prohibited candidates from engaging in

---

151 *Id.* at 198.
152 *Id.* at 198–99.
153 *Id.* at 200.
154 309 F.3d 1312 (11th Cir. 2002).
155 *See Carey*, 614 F.3d 189, 199 (6th Cir. 2010).
156 *Id.*
157 *See id.* at 204.
158 *Id.*
159 *Id.* (quoting Stretton v. Disciplinary Bd. of Supreme Court of Penn., 944 F.2d 137, 145 (3d Cir. 1991).
160 *Id.* at 205.

conduct such as making speeches to large groups and sending mass mailings, both of which "present little or no risk of undue pressure or the appearance of a quid pro quo."[161] Additionally, the prohibition was unfavorably biased towards certain candidates: "incumbent judges (who benefit from their current status) over non-judicial candidates, the well-to-do (who may not need to raise any money at all) over lower-income candidates, and the well-connected (who have an army of potential fundraisers) over outsiders."[162] Accordingly the Sixth Circuit held the personal solicitation clause violated the First Amendment, and struck down the clause, despite the plaintiff's assertion that similar provisions had been widely adopted by other states engaging in judicial elections.[163]

B. The Balancing Test: Seventh Circuit Opinions

In contrast to the Sixth and Eighth Circuits, the Seventh Circuit has mistakenly held that certain judicial speech restraints, including bans on endorsements and personal solicitations, should be reviewed under the balancing test rather than strict scrutiny. In *Siefert v. Alexander*,[164] an incumbent judge challenged the constitutionality of the party membership, party endorsement, and personal solicitation clauses contained in Wisconsin's Code of Judicial Conduct.[165] Interestingly, while the Seventh Circuit concluded that the appropriate standard of review for the party membership clause was strict scrutiny, it simultaneously held that the party endorsement and personal solicitation clauses should be reviewed under the less rigorous balancing test.[166]

Wisconsin's party membership clause[167] proscribed that "[n]o judge or candidate for judicial office or judge-elect may . . . [b]e a member of any political party."[168] Because the canon was a content-based speech restriction, preventing judicial candidates from speaking on their political views and their qualifications for office, the court

161 *Id.*
162 *Id.* at 204.
163 *See id.* at 206.
164 608 F.3d 974 (7th Cir. 2010).
165 *See id.* at 979.
166 *See id. at* 981–91.
167 *See id* at 981. Although this Note focuses on the circuit split that has emerged with respect to the party endorsement and personal solicitation clauses, it is necessary to review the Seventh Circuit's analysis regarding the party membership clause because it illustrates the court's reasoning for reviewing certain provisions under strict scrutiny and other provisions under the balancing test.
168 *See id.* (quoting Wis. Sup. Ct. R. 60.06(2)(b)(1)).

concluded that it was subject to strict scrutiny.[169] To further support its position, the court noted that the party membership clause fell "squarely within the ambit of the Supreme Court's analysis in *White I*,"[170] because, similar to *White*, the ban prevented "speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[171] Ultimately, the court held that the clause was unconstitutional because it was not narrowly tailored to meet the compelling state interest of preventing judicial bias for or against parties and because recusal was a less restrictive alternative to censoring the speech.[172]

Wisconsin's party endorsement clause prohibited "judges and judicial candidates from '[p]ublicly endors[ing] or speaking on behalf' of any partisan candidate or platform."[173] Although this clause, like the party membership clause, targeted campaign speech made during judicial elections, the Seventh Circuit oddly, and unpersuasively, distinguished the two canons.[174] Specifically, the court stated that "'[e]ndorsements primarily benefit the endorsee not the endorser' and may be exchanged between political actors on a quid pro quo basis. . . . [O]ffering an endorsement is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign."[175] Further, the court declared there was "a dividing line between the party [membership] rule, which impermissibly bars protected speech about the judge's own campaign, and the public endorsement rule, which addresses a judge's entry into the political arena on behalf of his partisan comrades."[176] Based on this unsound distinction, the court concluded that a more deferential approach should be afforded to the state, and that the party endorse-

169 *Id.* at 981.

170 *Id.*

171 *Id.* (quoting Republican Party of Minn. v. White, *White I*, 536 U.S. 765, 774 (2002)).

172 *See id.* at 982–83.

173 *See id.* at 983 (quoting Wis. Sup. Ct. R. 60.06(2)(b)(4)).

174 *See id.* at 983 ("An endorsement is a different form of speech that serves a purpose distinct from the speech at issue in *White I* and in the party identification rule . . . ."); *see also id.* at 984 ("[A] public endorsement is not the same type of campaign speech targeted by the impermissible rule against party affiliation in this case or the impermissible rule against talking about legal issues the Supreme Court struck down in *White I*.").

175 *Id.* at 984 (quoting Brief for Appellee at 378 n.11, Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010) (No. 09-1713) (internal citation omitted)).

176 *Id.*

ment clause was subject to review under the balancing test, rather than strict scrutiny.[177]

Relying on *Pickering*, the court noted that its task was to weigh the state's interest in regulating the speech against the employee's interest in speaking.[178] The court identified that the state had an interest in the ban for several reasons.[179] First, a judge who endorses a party may later preside over the party in court, which increases the risk of bias.[180] Additionally, the court stated that there are quid pro quo concerns with endorsements, and that "judicial candidates and judges-elect could elicit promises from elected officials, including local prosecutors and attorneys general, in exchange for their endorsement."[181] Finally, the court stated that Wisconsin has an interest in preventing its judges from "being at the fulcrum of local party politics."[182] In contrast to its analysis of the party membership clause, the court rejected the notion that recusal could be a less-restrictive alternative to bans on endorsements.[183] Instead the court noted that recusal would be impracticable because certain parties that may gain endorsement, such as prosecutors and sheriffs, are involved in litigation on a daily basis.[184] Therefore, in the court's view, because the "endorsement restriction d[id] not infringe on a judge's ability to inform the electorate of his qualifications and beliefs," the balance was struck in favor of the state, making the regulation permissible.[185]

The court also held that Wisconsin's personal solicitation clause was subject to review under a less exacting standard than strict scrutiny.[186] To support this position, the court incorrectly relied on the Supreme Court case of *Buckley v. Valeo*.[187] In *Buckley,* the Court held that restrictions on fundraising are less burdensome to speech rights than restrictions on spending, and therefore are reviewed under an intermediate scrutiny standard.[188] The Seventh Circuit misapplied this standard to the personal solicitation clause and held that because the clause did not impede "the amount or manner in which a candidate can spend money on his campaign," the appropriate level of

177 *Id.* at 983.
178 *Id.* at 985 (citing Pickering v. Board of Education, 391 U.S. 536, 568 (1968)).
179 *See id.* at 986.
180 *See id.*
181 *Id.* (quoting Brief of Conf. of Chief Justices, amicus, at 23).
182 *Id.*
183 *Id.* at 986–88.
184 *See id.* at 986–87.
185 *Id.* at 987–88.
186 *Id.* at 988.
187 424 U.S. 1 (1976) (per curiam).
188 *See Buckley*, 424 U.S. at 25.

review was the lesser standard of "closely drawn scrutiny."[189] Under this lower standard, the Seventh Circuit held that the personal solicitation ban was "drawn closely enough to the state's interest in preserving impartiality and preventing corruption to be constitutional."[190] The court conceded that the solicitation clause was overinclusive, and would prohibit some solicitations that would pose no risk to judicial bias, but nonetheless declared that this was not fatal to the constitutionality of the ban.[191]

Although the court in *Siefert* explicitly stated that its analysis was dependent on the fact that the challenger was an incumbent judge, and refused to comment on whether the regulations would be valid for a judicial candidate who was not yet a judge,[192] the Seventh Circuit addressed this issue in *Bauer v. Shepard*.[193] In *Bauer*, plaintiffs Torrey Bauer, a candidate for judicial office, and David Certo, a sitting judge, brought suit alleging that various provisions of the Indiana Code of Judicial Conduct were unconstitutional.[194] In determining the constitutionality of certain provisions the court affirmed that the analysis of *Siefert* applied,[195] thus suggesting that *Siefert* extends to challenges made both by judicial candidates and incumbent judges.

The court noted that under *Siefert,* electoral activity made on behalf of third parties (such as endorsements of partisan candidates in *Siefert* and making speeches on behalf of political organizations in *Bauer*) are governed by First Amendment principles regarding public employees, and therefore are subject to the balancing test rather than strict scrutiny.[196] The court also affirmed that a lower level of scrutiny applied to personal solicitation bans.[197] While the court acknowledged that their balancing approach was in conflict with both the Sixth and Eighth Circuits, the court commented that they remained unconvinced by the approaches taken by those courts. Specifically with respect to the Eighth Circuit decision the *Bauer* court stated:

> Although *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010), recently held that Minnesota's equivalents of Rule 4.1(A)(3) (the

189 *See Siefert*, 608 F.3d at 988.

190 *Id.* at 990.

191 *See id.*

192 *See id.* at 988 ("Our treatment of the endorsement prohibition is based on the claims that Judge Siefert, an incumbent, brings. This is not the appropriate case to address the issues of regulations for judicial candidates who are not judges.").

193 620 F.3d 704 (7th Cir. 2010).

194 *See id.* at 707.

195 *See id.* at 711.

196 *See id.*

197 *See id.* at 706.

> no-endorsement rule) and Rule 4.1(A)(4) and (8) (the solicitation limits) violate the *first amendment,* it did not discuss (or even cite) *Pickering, Letter Carriers,* or any of the Supreme Court's other decisions concerning restrictions on public employees' political activities. The majority in *Wersal* concluded that the court's en banc decision in *White II* requires the application of strict scrutiny to all ethical rules that affect either judicial campaigns or judges' participation in campaigns for other offices. We are unpersuaded and shall stick with *Siefert's* analysis, which differentiates what judges can do in their own campaigns (the subject of *White I*) from how judges can participate in other persons' campaigns (the subject of *Letter Carriers* and similar decisions).[198]

Due to these differing standards, many of the states in the Seventh Circuit have held intact provisions prohibiting judges and judicial candidates from endorsing public officials and soliciting campaign contributions,[199] while states in the Sixth[200] and Eighth[201] Circuits have removed these bans.

IV. Analysis: Determining the Correct Standard of Review

As it currently stands, a circuit split has emerged regarding the appropriate level of review for restraints on judicial campaign speech. On one side, the Sixth and Eighth Circuits have applied strict scrutiny, which permits regulation of judicial candidates' speech only if the law is *narrowly tailored* to meet a compelling state interest. Under this standard of review, those circuits have deemed unconstitutional restrictions prohibiting judicial candidates from endorsing public officials or from personally soliciting campaign contributions. On the other side, the Seventh Circuit has adopted the more lenient "balancing test," weighing the state interests in regulating the speech against the candidate's interest in speaking. Using this approach, the Seventh Circuit has upheld similar restrictions on public endorsements and personal solicitations, finding that the balance is in favor of the States in maintaining the actual and apparent impartiality of their judiciaries.

By examining the principles of the First Amendment as well as practical considerations, it is apparent that judicial speech restraints

198 *See id.* at 713 (emphasis added).

199 *See, e.g.*, Winnig v. Seller, 731 F. Supp. 2d 855 (W.D. Wis. 2010) (ruling that the prohibitions applied to the candidate for a judicial position).

200 *See, e.g.*, Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010) (determining that the party affiliation and solicitation clauses violated free speech).

201 *See, e.g.*, Wersal v. Sexton, 613 F.3d 821 (8th Cir. 2010) (ruling that the clauses in Minnesota's Judicial Code of Conduct prohibiting judges from endorsing other candidates or soliciting votes violated their First Amendment rights).

should be reviewed under strict scrutiny. Accordingly, the Seventh Circuit's application of the balancing test is inappropriate in the context of judicial elections.

A. Seventh Circuit Opinion: Logical Shortcomings

Not only is the Seventh Circuit's analysis in *Siefert* contrary to First Amendment jurisprudence, the opinion itself is logically inconsistent. To begin, the Court in *Siefert* draws a distinction between the party membership clause, which it reviewed under strict scrutiny, and the endorsement clause, which it reviewed under the balancing test.[202] To distinguish the two, the court commented that the speech at issue for each respective clause served fundamentally different purposes.[203] Specifically the court stated that when a judicial candidate affiliates with a party he is thereby expressing his own views and qualifications, but when endorsing a public official he is not.[204] Proceeding on this faulty premise, the court held that the party membership clause should be held to higher scrutiny because it regulated content based speech about a candidate's own campaign, while the endorsement clause did not.[205]

This argument, however, is illogical. When a judicial candidate endorses a public official, it is likely that his views are aligned with the endorsee's. Thus, by supporting a public official, the judicial candidate has the opportunity to announce his views on a number of matters. In fact, endorsements are generally used in a host of situations to do just that. For example, political parties endorse candidates to communicate to the public that the candidate holds certain views on issues. Additionally, there is no more threat to impartiality when a judge associates with a candidate and endorses him than when a judge associates with a party.[206] Therefore, the Seventh Circuit's argument distinguishing between the purpose and speech at issue with respect to the party membership clause and endorsement clause is inconsistent. Both clauses burden the same type of speech and should be held to the same standard.

---

202 *See* Siefert v. Alexander, 608 F.3d 974, 981–88 (7th Cir. 2010).

203 *See id.* at 983.

204 *See id.*

205 *See id.* at 984.

206 *See generally* Petition for Writ of Certiorari, *Siefert v. Alexander*, 20–21 (No. 10-405).

B. Strict Scrutiny Is the Appropriate Standard Under First Amendment Principles

Aside from preliminary matters regarding the inconsistencies within the Seventh Circuit's opinion in *Siefert*, the court makes an even greater error in applying the balancing test to the context of restrictions on judicial campaign speech.

There is little debate that political speech is at the core of our First Amendment freedoms.[207] The Supreme Court has declared that the First Amendment has its "fullest and most urgent application precisely to the conduct of campaigns,"[208] and that discussion and debate about candidates' qualifications is vital to operation of government.[209] Further, the Court has adamantly stated that it has "never allowed the government to prohibit candidates from communicating relevant information to voters during an election."[210] Restrictions on political speech have been held to the most exacting scrutiny. Accordingly, content-based restrictions on judicial candidates' speech must also be subject to strict scrutiny. With respect to the endorsement and personal solicitation clauses adopted by many states, it is clear that both of these bans regulate speech based on their content; they prevent candidates from speaking about certain subjects (endorsements) but not others, and "they prevent candidates from asking for support in some ways (campaign funds) but not others (a vote, yard signs)."[211] Consequently, these prohibitions should be reviewed under strict scrutiny.

The Seventh Circuit relies on *Pickering* and *Letter Carriers* to illustrate that the Supreme Court has invoked a lesser standard of scrutiny for regulations of speech made by government employees, balancing the employee's right to speak on matters of public concern against the government's need for efficient operation of government functions.[212] Specifically with respect to *Letter Carriers,* the court commented that under a more deferential standard of review, the Supreme Court found the Hatch Act, which prohibited federal employees from participating in certain political activities, including

207 *See* Republican Party of Minn. v. White, *White I*, 536 U.S. 765, 774 (2002); *see also* Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional,* 35 IND. L. REV. 735, 741 (2002) ("[P]olitical speech has long been regarded [as] at the very core of the First Amendment.").

208 Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

209 *See* Buckley v. Valeo, 421 U.S. 1, 14 (1976) (per curiam).

210 *White I*, 536 U.S. at 782.

211 Carey v. Wolnitzek, 614 F.3d 189, 199 (6th Cir. 2010).

212 *See* Pickering v. Board of Education, 391 U.S. 536, 568 (1968).

political campaigns, constitutional.[213] However, the Seventh Circuit fails to recognize that neither of these cases, nor any of the other government employee speech cases, has ever been applied to elected officials.[214] To the contrary, "[t]he Supreme Court has long found the speech of elected officials to be as protected as that of ordinary citizens."[215] Further, the purpose of allowing the state to regulate public employee speech was to enable the employer, the government, to operate efficiently. However, in the case of elected judges, while the government is technically the employer, the judge ultimately is accountable to the people. Accordingly, the employee speech cases are not analogous to the situation presented.

Further, with respect to the solicitation clause in particular, the court concluded that under *Buckley v. Valeo*, restrictions on candidate contributions are subject to lesser scrutiny than restrictions on candidate spending.[216] Accordingly, the court held that the personal solicitation clause would be reviewed under the lesser standard of "closely drawn scrutiny," rather than under strict scrutiny, because the ban did "not restrict the amount or manner in which a judicial candidate can spend money on his or her campaign. . . ."[217] However, the court commits error in its analysis of *Buckley*, and the other Supreme Court cases in its line. The Supreme Court cases, which have drawn a distinction between candidate contributions and candidate spending, discussed specific limits on campaign contributions. They did not discuss whether the contribution could be made at all.[218] In fact, the Court in *Buckley* noted that a limitation on the amount a candidate may contribute "involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."[219] In the present case, however, personally solicited contributions in any amount are not permitted. Thus, this situation differs greatly from that in *Buckley*. Here, the personal solicitation ban does not limit contributions; rather it

213 *See* Siefert v. Alexander, 608 F.3d 974, 980 (7th Cir. 2010).

214 *See id.* at 991 (Rovner, J., dissenting); *see generally* Petition for Writ of Certiorari, *Siefert v. Alexander*, at 11 (No. 10-405) ("None of these cases have ever stood for the proposition that elected officials' speech, including judicial candidates' speech, could likewise be restricted.").

215 *Siefert*, 608 F.3d at 991 (Rovner, J., dissenting).

216 *See id.* at 988 (majority opinion).

217 *Id.*

218 *See generally* Petition for Writ of Certiorari, *Siefert v. Alexander*, at 8 (No. 10-405) (explaining that in *Buckley*, the "closely drawn" scrutiny test was applied to campaign contribution limits).

219 Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam).

restricts speech based on its content.[220] As content-based speech regulations have always been reviewed under strict scrutiny, it is clear that the personal solicitation ban should follow this precedent.

C. Policy Considerations Favor Strict Scrutiny

As discussed, the First Amendment has its fullest application in the context of political campaigns, and political speech has always been subject to strict scrutiny.[221] Admittedly, the role of judges differs from that of other elected officials in many important aspects. In the most general sense, legislators and executive officials represent their constituents and strive to advance their constituents' interests. Judges, on the other hand, "do not sit as representatives of particular persons, communities, or parties . . . ."[222] Rather, they are interpreters of the law. Nonetheless, states have voluntarily chosen to select their judges through elections and must abide by the processes that accompany it. Voters in judicial elections, like all other elections, must choose their candidates based on a host of reasons including the candidate's qualifications, views, experience, past performance, and suitability for the role.[223] Accordingly, candidates must be allowed to convey all relevant information to voters, so that voters can to make an informed decision. The Seventh Circuit argues that states have an interest in maintaining the impartiality of the judiciary that outweighs a candidate's right to speech. This argument is unpersuasive. Of course there are dangers in judicial campaigning, but these dangers are the product of having elected, rather than appointed, judges. To apply a different standard of review, as the Seventh Circuit does, to ameliorate these dangers is a form of judicial legislation that contorts First Amendment jurisprudence in the process. States with elected judges have made a choice and courts overstep their boundaries when they substitute their own judgment for the legislatures'.

Further, the Seventh Circuit does not need to "dilute the First Amendment"[224] in order to effectuate states' interest in preserving the impartiality of the judiciary. Instead of applying an inappropriate standard, the court can very well give deference to this interest under a strict scrutiny analysis itself. In fact, strict scrutiny assumes that a

220 *See generally* Petition for Writ of Certiorari, *Siefert v. Alexander*,(No. 10-405) (listing examples of courts striking down content-based speech restrictions and suggesting this case is analogous).

221 *See supra* notes 206–07 and accompanying text.

222 *See* Republican Party of Minn. v. White, 536 U.S. 765, 806 (Ginsburg, J., dissenting).

223 *See id.* at 807–09.

224 Carey v. Wolnitzek, 614 F.3d. 189, 200 (6th Cir. 2010).

state will have a compelling interest in regulating the speech—and will allow that speech to be regulated—so long as the restriction is narrowly tailored. It is illogical to resort to a different standard when strict scrutiny can provide the appropriate safeguard.

Finally, many states have adopted these judicial canons as a means to ensure the impartiality of their judiciaries. This Note does not dispute the significance of that interest. On the contrary, it is undeniable that due process requires that litigants be afforded the right to be heard by an impartial tribunal.[225] However, regulating the speech of judicial candidates is not an effective way to accomplish this goal.[226] Restricting judges from speaking about their interests does not prevent judges from having these interests. Similarly, it is unlikely that a judge's expressing of his views makes him "less impartial or more likely to decide the case in a particular direction."[227] Rather, exposing citizens to judicial candidates' views and interests during the election process provides for greater transparency in the process overall, and increases the likelihood for recusal when appropriate. Thus, only when a judicial speech regulation survives the utmost scrutiny shall it be enforced.

CONCLUSION

The Seventh Circuit has inappropriately applied the balancing test to a realm of speech that calls for strict scrutiny. In doing so, it has effectuated a split among the Circuits regarding the appropriate level of scrutiny to afford judicial campaign speech. Like other forms of political speech, judicial campaign speech must be afforded the utmost protection under the First Amendment. Any attempts to restrict judicial candidates' speech must fail unless the prohibition survives the exacting standard of strict scrutiny. Although many states have long adopted judicial elections as a means of selecting their judiciary, they cannot turn a blind eye to the dangers that are a product of this decision. Judicial elections inherently turn candidates into politicians. If states are uncomfortable with this result, the appropriate remedy is to amend their selection process. However, while states continue to choose their judiciary through elections, they must afford

225 *See White I*, 536 U.S. at 815 (Ginsburg, J., dissenting).

226 *See generally* Chemerinsky, *supra* note 206 (asserting that if we are to allow judges to be elected, we must allow them to engage in political speech, so the voters are able to make an informed choice).

227 *Id.* at 745. "Antonin Scalia would vote to overrule *Roe v. Wade* whether he expressed this in his confirmation hearings or not." *Id.* at 744.

their judicial candidates the same protections that are afforded to all other elected officials. Anything less is a violation of the First Amendment.